No. 03-317

In the Supreme Court of the United States

VIDTAPE, INC., ET AL., PETITIONERS

v.

ELAINE L. CHAO, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence supported the district court's finding that petitioner Satinder Singh Anand was an "employer" within the meaning of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 203(d).

2. Whether the evidence supported the district court's finding that Malkit Singh was a non-exempt employee and therefore entitled to back wages under the FLSA.

3. Whether the evidence supported the district court's finding that petitioners failed to pay their employees in accordance with the FLSA's minimum wage and overtime provisions.

4. Whether the evidence supported the district court's calculation of damages.

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OPINIONS BELOW

The summary order of the court of appeals (Pet. App. 1a-10a) is not published in the *Federal Reporter* but is reprinted in 66 Fed. Appx. 261. The district court's amended memorandum opinion (Pet. App. 11a-51a) is reported at 196 F. Supp. 2d 281.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 2003. The petition for a writ of certiorari was filed on August 26, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners Vidtape, Inc. (Vidtape), and Inventive Technology Systems, Inc. (Inventive), are engaged in

the business of manufacturing, duplicating and selling videocassettes. Pet. App. 13a. Petitioner Mohinder Singh Anand is Vidtape's president and sole shareholder. *Ibid.* Petitioner Satinder Singh Anand is Inventive's president, and petitioner Arjan Singh Anand is Inventive's general manager. *Id.* at 14a. On May 1, 1998, the Secretary of Labor (Secretary) filed this lawsuit alleging that petitioners violated the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, from May 1995 to June 1997 by (1) failing to pay their employees the minimum wage and overtime; (2) employing a child in violation of the FLSA's child labor provision; (3) failing to keep and maintain appropriate records; and (4) placing certain articles into the stream of commerce in violation of the FLSA's "hot goods" provision. Pet. App. 12a-13a. The Secretary sought back wages on behalf of 67 current and former employees, liquidated damages, and an injunction against future FLSA violations. *Id.* at 3a.

2. The United States District Court for the Eastern District of New York conducted a bench trial at which 21 former employees testified on the Secretary's behalf. Pet. App. 12a, 19a. Several testified that, during the relevant time period, they worked an average of 60 hours per week and were paid $4 per hour, without overtime. *Id.* at 20a-21a. In addition, because petitioners did not keep adequate payroll records, the Secretary introduced testimony from an expert who calculated the back wages owed to each employee based upon the assumption that they were paid $4 per hour. *Id.* at 21a. Petitioners countered with testimony of their own in an effort to prove that they complied with the FLSA's minimum wage and overtime provisions. *Id.* at 23a-27a.

The district court entered judgment for the Secretary. Pet. App. 11a-51a. The court found the Secretary's witnesses credible and found petitioners' witnesses not credible. *Id.* at 27a. Based on the testimony of the witnesses that the court found credible, the court concluded that all petitioners except Inventive and Arjan Singh Anand committed willful violations of the FLSA's minimum wage and overtime provisions. *Id.* at 36a-37a, 39a-40a. Inventive was not liable because it began operations after the time period covered by the wage claims; Arjan Singh Anand was not liable because he was not an "employer" during the relevant period. See *id.* at 12a, 16a, 27a, 29a, 40a n.6. In finding the minimum wage and overtime violations, the court rejected petitioner Satinder Singh Anand's contention that he too was not an "employer." Applying an "economic reality" test, the court found that Satinder Singh Anand qualified as an employer because he hired some employees, gave out work assignments, acted as a supervisor, and had authority to sign checks. *Id.* at 14a-15a, 27a-29a.[1]

Having found FLSA violations, the district court entered an injunction prohibiting petitioners from engaging in future violations of the FLSA and awarded the Secretary back wages and liquidated damages totaling $239,707.58 against Vidtape, Mohinder Singh Anand, and Satinder Singh Anand. Pet. App. 48a-50a. The money judgment included a back wage award for employee Malkit Singh, despite petitioners' claim that he fell within the FLSA's exemption for persons "em-

[1] The district court also ruled that petitioners violated the FLSA's child labor, record-keeping, and "hot goods" provisions. Pet. App. 32a-33a, 37a-39a. Petitioners have not sought review of those rulings.

ployed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. 213(a)(1). Whether an employee falls within that exemption is determined by applying a "long test" if he earns between $155 and $250 per week on a salary basis, or by applying a "short test" if he earns more than $250 per week on a salary basis. See 29 C.F.R. 541.1(f). The district court applied the "long test" to determine Malkit Singh's status and concluded that petitioners' evidence did not establish all of the requirements for the exemption. Pet. App. 43a-44a.[2]

3. In an unpublished summary order, the United States Court of Appeals for the Second Circuit affirmed the district court's judgment in relevant part. Pet. App. 1a-10a. The court of appeals rejected most of petitioners' contentions without discussion. *Id.* at 4a. The court explained that it had considered those arguments and found them to be "without merit." *Ibid.* The court's summary order did discuss petitioners' contention that Malkit Singh was exempt from the FLSA as an executive employee. *Id.* at 4a-8a. Like the district court, the court of appeals concluded that the "long test" governed Malkit Singh's status, because his wages, excluding those earned from sales calls and commissions, amounted to less than $250 per week. *Id.* at

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[2] The district court mistakenly held Inventive jointly and severally liable for back wages, Pet. App. 46a, but the court of appeals vacated that aspect of the judgment based on the parties' stipulation, *id.* at 3a-4a. The district court subjected Inventive and Arjan Singh Anand to prospective injunctive relief notwithstanding its conclusion that they were not liable for back wages and liquidated damages because the court concluded that Vidtape and Inventive became an "enterprise" and Arjan Singh Anand became an "employer" after the time period covering the wage claims. *Id.* at 29a & n.4, 46a.

6a. The court of appeals then upheld the district court's finding that petitioners had not established all of the requirements for the exemption. *Ibid.* Finally, the court of appeals held that, even though Malkit Singh performed some supervisory duties, the evidence did not establish that his job "was sufficiently different from the employees working alongside him to make their testimony as to the conditions and hours of their employment inapplicable to him." *Id.* at 8a. Accordingly, the court concluded, the "testimony of those employees was sufficient to support an award of back-pay * * * with respect to Malkit Singh." *Ibid.*

ARGUMENT

The court of appeals' summary order is correct and does not conflict with any decision of this Court or any other court of appeals. The petition for a writ of certiorari raises only fact-bound challenges, the resolution of which would have no significance beyond this case. Accordingly, this Court's review is not warranted.

1. Petitioners first contend (Pet. 16-19) that the district court's finding that Satinder Singh Anand was an "employer" is "inconsistent" with *Goldberg* v. *Whitaker House Cooperative, Inc.*, 366 U.S. 28, 32-33 (1961), and *Herman* v. *RSR Security Services, Ltd.*, 172 F.3d 132, 139-141 (2d Cir. 1999). That contention is incorrect. The district court expressly applied *RSR Security Services*, which elaborates on the "economic reality" test endorsed by this Court in *Whitaker House* for determining whether an employment relationship exists under the FLSA. Pet. App. 27a-28a. Petitioners raise only a fact-bound challenge to the application of settled law, which does not warrant this Court's review.

The district court correctly applied the economic reality test of *RSR Security Services* to the facts of this case. See Pet. App. 27a-29a. Relevant factors under the test include considerations such as whether the alleged employer had the power to hire or fire employees, whether he supervised or controlled employee work schedules or conditions of employment, whether he determined the rate or method of payment, and whether he maintained employment records. See *id.* at 27a-28a (citing *RSR Sec. Servs.*, *supra*). As the district court explained, employee witnesses for the Secretary testified that Satinder Singh Anand hired employees, that they reported to him when Mohinder Singh Anand was not available, that he prioritized their work and set their schedules, and that he had authority to sign checks and did so on numerous occasions. *Id.* at 28a (citing to record). Based on the "totality of the circumstances," the district court reasonably concluded that Satinder Singh Anand was an employer. *Ibid.* (quoting *RSR Sec. Servs.*, 172 F.3d at 139). Moreover, petitioners' challenge to the district court's fact-finding implicates no important legal rule of general application and thus does not warrant further review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

2. Petitioners next contend (Pet. 19-24) that the Secretary was not entitled to an award of back wages for Malkit Singh. Here again, petitioners essentially challenge the district court's fact-finding rather than a broadly applicable legal ruling. Their challenge has two components, neither of which has merit.

a. Petitioners mistakenly contend (Pet. 19-23) that the Secretary did not produce sufficient evidence that Malkit Singh was underpaid in violation of the FLSA's

minimum wage and overtime provisions. Petitioners acknowledge that the Secretary may meet her burden of proof by presenting the "testimony of a representative sample of employees." Pet. 20 (quoting *Reich* v. *Southern New England Telecomm. Corp.*, 121 F.3d 58, 67 (2d Cir. 1997)). And petitioners do not dispute that, in this case, the Secretary introduced testimony regarding petitioners' wage and hour practices from a representative sample of 21 former employees. See Pet. App. 35a. But petitioners contend (Pet. 20-23) that those workers were not representative of Malkit Singh's job category. As the court of appeals explained, however, two of the employee witnesses "testified to the effect that Malkit Singh worked the same hours as they did at the factory." Pet. App. 8a. Their testimony, coupled with petitioners' failure to show that Malkit Singh's job "was sufficiently different from the employees working alongside him to make their testimony as to the conditions and hours of their employment inapplicable to him," *ibid.*, established that petitioners failed to pay Malkit Singh in accordance with the FLSA. There is thus no merit to petitioners' assertion that the Secretary failed to meet her burden of proof on that issue.[3]

b. Petitioners further argue (Pet. 23-24) that the courts below erred in applying the "long test," rather than the "short test," to determine whether Malkit Singh met the exemption for someone "employed in a

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[3] Petitioners are also incorrect in suggesting that the court of appeals' decision is "inconsistent with" the Second Circuit's decision in *Southern New England Telecommunications Corp.* Pet. 19. The court of appeals expressly cited that case, see Pet. App. 8a, and, as discussed in the text above, explained why there was sufficient evidence from employees representative of Malkit Singh's job category.

bona fide executive, administrative or professional capacity." 29 U.S.C. 213(a)(1). That argument also lacks merit. As both the district court and the court of appeals determined, the "long test" applied to Malkit Singh because his salary-based income did not exceed $250 per week. Pet. App. 6a (citing 29 C.F.R. 541.1(f) and explaining that "only wages accrued 'on a salary basis,' count toward the calculation"); see *id.* at 43a-44a.

Petitioners bore the burden of proof on whether Malkit Singh falls within the exemption. See *Walling* v. *General Indus. Co.*, 330 U.S. 545, 547-548 (1947) (employer bears the burden of proving exemptions from the FLSA). The district court heard the relevant testimony and concluded that petitioners had failed to prove that each of the long test's requirements had been satisfied. See Pet. App. 43a-44. Not surprisingly, the court of appeals found no clear error in the district court's fact-finding. *Id.* at 6a; see *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709, 713 (1986) (clearly erroneous standard applies to the review of the "facts necessary to a proper determination of the legal question whether an exemption to the FLSA applies in a particular case"). That fact-bound determination does not warrant this Court's review.

3. Petitioners' third and fourth contentions (Pet. 24-30) are that the district court erred in finding minimum wage and overtime violations and in calculating damages. The district court's determinations were based upon the former employees' testimony that they worked an average of 60 hours per week, including occasional Sundays, at a rate of $4 per hour. See Pet. App. 35a-37a, 40a-41a. Petitioners insist that those witnesses' testimony was "replete with inconsistencies," Pet. 25, and was rebutted by the testimony of petitioners' witnesses, see Pet. 29. The district court, how-

ever, "was the proper judge of [the witnesses'] credibility," *Walling*, 330 U.S. at 550, and it found the former employees credible and petitioners' witnesses not credible. Pet. App. 20a-21a, 23a-24a, 26a-27a, 35a. In any event, the district court's fact-laden conclusions on liability and damages, affirmed without comment by the court of appeals, established no precedent for future cases and consequently do not warrant review by this Court.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] Petitioners also allege that the district court's findings on minimum wage and overtime violations and damages are "inconsistent" with "[d]ecisions of this Court and of [o]ther United States Courts of Appeal." Pet. 24, 26. Petitioners, however, cite no circuit court decisions in support of that claim, and the district court expressly (and correctly) applied the only case from this Court that petitioners cite—*Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). See Pet. App. 34a. There is therefore no "inconsistency" between the district court's ruling and either *Anderson* or the decision of any court of appeals.